

<i>NATIONAL MARINE FISHERIES SERVICE INSTRUCTION 02-110-13</i> December 15, 2005	
<i>Protected Resources Management</i>	
<i>Improvement Plan for Section 7 Consultations Under the ESA</i>	
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<i>SUMMARY OF REVISIONS:</i>	

1.0 Introduction. A new delegation of authority has been issued to NMFS Regional Administrators and the Director, Office of Protected Resources, to conduct consultations pursuant to Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536. The purpose of the new delegation is to provide nationwide clarity and consistency in the delegation of that authority. To supplement the delegation and address procedural deficiencies in some of the national ESA consultation guidance, NMFS issues this Section 7 Improvement Plan.

2.0 Objective. To improve the quality of the agency's Section 7 consultations under the ESA.

3.0 Process

3.1. *Standard Guidance*. Development of up-to-date standard guidance is fundamental to ensuring conformity with agency policy and procedure. The Office of Protected Resources, in cooperation with Regional Offices, and NOAA General Counsel will develop a standard set of guidelines and guidance to staff and managers on the consultation process. This will include updating and revising the Section 7 Consultation Handbook to address advances and changes in policy, law, and technical and procedural knowledge.

3.2. *Training Program*. The objectives of the training program are to ensure that Regional and Headquarters managers and consultation personnel have received the training necessary to (a) comply with applicable legal requirements, agency policy and guidance; (b) meet demands for quality Section 7 consultations and consultation products and (c) maintain proficiency in the conduct of consultations.

For the purposes of this document, training consists of formal curricula delivered in a classroom setting (such as the training provided through the U.S. Fish and Wildlife Service's National Conservation Training Center and from the Office of Protected Resources), workshops, Section 7 Coordinator and NOAA General Counsel updates, or relevant materials provided through the Internet.

Training

The NMFS Section 7 program consists of three tiers of training: tier 1 comprises formal classroom style training in Section 7 process, procedure and analysis; tier 2 is more tailored to specific Regional or Headquarters needs; and tier 3 consists of requirements to keep skills current in the field of biology, writing, and other appropriate fields.

Tier I.

The first tier provides formal classroom style basic and advanced Section 7 training.

Basic Section 7 Training Program. Within the first year of their employment as consulting biologists, all employees who are responsible for or participate in Section 7 consultations or who review biological opinions or other documents produced by those consultations will be required to complete a basic Section 7 course developed by the Office of Protected Resources, the U.S. Fish and Wildlife Service's National Conservation Training Center, or both. The curricula for the basic Section 7 training courses will ensure that consultation personnel understand the legal and regulatory requirements applicable to Section 7 consultation; processes for gathering, analyzing, and reporting using the best scientific and commercial data available; and applicable agency policy and guidance on the conduct and review of Section 7 consultations and consultation documents. This is an ongoing training program. The Office of Protected Resources has provided training to all Regional Offices and will continue to do so. In addition, NMFS Section 7 staff teaches a course in Section 7 at the National Conservation Training Center. This course is open to all NMFS Section 7 staff.

Advanced Section 7 Training Program. The Office of Protected Resources has worked with the U.S. Fish and Wildlife Service and the National Conservation Training Center to develop an advanced Section 7 training program designed for more experienced Section 7 staff or personnel who have received the basic Section 7 training program and have 2 or more years of experience with Section 7 consultations. The curricula for the advanced Section 7 training courses are designed to ensure that consultation personnel conduct consultations on complex actions using methods that are transparent, objective, and replicable and that comply with the best standards and practices of the relevant sciences. Each regional office shall provide an opportunity for this training to senior consulting biologists as appropriate and as resources permit.

Section 7 Training Programs for Managers. The Office of Protected Resources, in conjunction with the Regions, will provide Section 7 training to managers who directly supervise Section 7 personnel. These training sessions will consist of an 8-hour overview or separate 2- to 4-hour modules that ensure these managers understand the legal and regulatory requirements applicable to Section 7 consultation, processes for ensuring and controlling quality in consultations and consultation documents, and applicable agency policy and guidance on the conduct and review of Section 7 consultations and consultation documents. These sessions will also include discussion and guidance on the decision-making process, application of policy, and documentation and accountability to ensure consistency between management decisions and to ensure complete and defensible administrative records. All first-line Section 7 supervisors who have not had prior consultation experience will be required to take the overview.

Tier II.

National and Regional Section 7 Coordinators provide ongoing training to Section 7 staff by providing guidance to Section 7 staff. In addition, training tailored to meet Regional needs and Region-specific issues is also of value to Section 7 staff.

Continuing Training and Information Dissemination to Regional Section 7 Coordinators. The Office of Protected Resources will organize annual meetings with Regional Section 7 coordinators to provide additional training, discuss current policy and consultation issues, and review the outcome of recent litigation. The Office of Protected Resources will work with Regional Section 7 Coordinators and NOAA General Counsel to develop and maintain a website containing templates for consultations document, current Section 7 guidance and policies, and recent court opinions.

Regionally Developed Training for Regional Staff. Each Region will develop regional training and other means of information dissemination on the Quality Assurance Program and regulatory and legal updates from NOAA General Counsel.

Tier III.

The Office of Protected Resources and Regional Offices will provide opportunities to Section 7 staff to take continuing education course to maintain current skills in their field. The national and regional section 7 coordinators will alert and advise supervisors on specific training opportunities for consulting biologists. Each nonsupervisory staff member will participate in at least one of the following types of training each year.

Continuing Education: Continuing education may consist of a course either in a classroom or web-based setting in the area of ecology, conservation, technical writing, negotiation, or other appropriate field, attendance at professional symposia, practical field experience, or advanced academic coursework.

Annual Section 7 Workshops. The Office of Protected Resources in conjunction with the Regions will convene annual workshops to provide consulting biologists with the continuing, professional education necessary to meet the evolving demands placed on Section 7 consultations. These workshops will provide Regional personnel with short courses covering Section 7 issues, including population biology and ecology, conservation biology, risk assessment methods, geographic information systems, and legal issues that affect Section 7 consultations.

3.3. *Annual Program Review.* Each year, the Office of Protected Resources, will organize a team composed of Regional Section 7 Coordinators, a representative from the Office of Protected Resources, and a representative from NOAA General Counsel to review a sample of Section 7 decision documents. Each Region will have a subset of its consultations reviewed on an annual basis. The team will include the Section 7 Coordinator from the Region being reviewed and at least one representative from another Regional Office.

On average, NMFS completes over 1,000 Section 7 consultations each year. In 2004, NMFS completed over 1,300 Section 7 consultations. Because formal consultations resulting in biological opinions are often technically complicated, information-intensive and lengthy, it is

possible to review only a small sample of those Section 7 documents. If a Region completes fewer than 10 formal consultations in a year, each of those consultations will be reviewed. If a Region completes more than 10 formal consultations and biological opinions in a year, a sample of those consultations will be reviewed. 10 biological opinions and five informal consultations would be selected and reviewed. Samples and sub-samples will be generated using data from the Public Consultation Tracking System database and will be stratified to capture the complexity of consultations and field office or program organization in the various Regions.

The annual review will examine whether the process requirements described in Section 4.0 of the delegation of authority for Section 7 have been put in place and are being followed.

Following each review, the Office of Protected Resources in coordination with the review team will develop a report based on the review of Regional consultations and consultation documents. The Office of Protected Resources will share a draft of the report with the appropriate Regional Administrator and will allow the Regional Administrator the opportunity to review and comment on the report.

When the report is finalized, the Office of Protected Resources will submit the report to each Regional Administrator, Assistant Regional Administrator for Protected Resources, Deputy Assistant Administrator for Regulatory Programs and the Assistant Administrator for Fisheries. This report will enumerate the degree to which the annual sample complies with the requirements contained in Section 4.0 of the delegation of authority for Section 7. If appropriate, the report will recommend changes to improve the level of compliance of the delegation or policy and procedures.

3.4 Suspension of Delegation. The annual reviews will be used to determine whether the agency is complying with the requirements of Section 4.0 of the delegation of authority for Section 7 to conduct those consultations. If two consecutive annual reviews indicate a pattern of nonconformance, suspension of delegation may result. The process is described below.

The Assistant Administrator for Fisheries shall provide the Regional Administrator written notice identifying specific measures that must be implemented to remedy the problems identified in the consecutive annual reviews accompanied by specific deadlines for implementing those measures. In addition, the Assistant Administrator for Fisheries shall specify a schedule for a follow-up review of the Regional Section 7 program that will be used to determine whether the Region has implemented the measures recommended by the Assistant Administrator for Fisheries or alternative measures and whether those measures have remedied the identified problems.

If the Regional Administrator does not agree with the finding that the Region has demonstrated a pattern of failing to conduct its Section 7 program according to the terms of the Section 7 delegation, he or she may provide the Assistant Administrator for Fisheries a written response to the review prior to implementing the specific measures identified in the written notice. The Assistant Administrator for Fisheries will provide a written response to the Regional Administrator regarding the findings of the review and the Region's response.

If a follow-up review demonstrates that a Region has not successfully implemented the measures recommended by the Assistant Administrator or alternative measures or if those measures have not remedied the identified problems, the Assistant Administrator for Fisheries shall provide the Regional Administrator written notice that a more detailed review of the Region's consultation

program will occur. That review will consist of the following elements:

- I. The Regional decision-making structure associated with Section 7 decisions. Specifically, this review shall examine (a) who signs the products generated by formal consultations in the Region; (b) who signs the products generated by informal consultations in the Region; (c) who is responsible for ensuring that the products of formal and informal consultation comply with national and Regional policy and guidance for these decision-makers; (d) what standards these individuals use and how these standards are codified within the Region and transmitted to regional consulting staff and their managers.
- II. The mechanism Regions use to conduct internal reviews of its Section 7 programs to ensure and control the quality of regional consultations.
- III. How the Region implements and conforms to specific training requirements for consulting biologists, reviewing biologists, and its managers.

Following the detailed review, the Director, Office of Protected Resources, will develop a report based on its review of Regional consultations and consultation documents, share a draft of the report with the appropriate Regional Administrator, and allow the Regional Administrator the opportunity to review and comment on the report.

The Director, Office of Protected Resources, shall then submit the final report, including any Regional comments, to the Regional Administrator, Assistant Regional Administrator for Protected Resources, Deputy Assistant Administrator for Regulatory Programs and the Assistant Administrator for Fisheries. The Assistant Administrator for Fisheries shall then provide written notice to the Regional Administrator of the final findings of the report and, if appropriate, suspend the Regional Administrator's authority to complete Section 7 consultations or sign consultation documents pending implementation of the measures to remedy any continuing problems. The written notice will require the Regional Administrator to submit draft and final biological opinions to the Office of Protected Resources for review and clearance on behalf of the Assistant Administrator for Fisheries who will assume responsibility for distributing draft biological opinions and signing final biological opinions. This written notice shall require specific measures to be implemented to remedy identified problems.

Following the suspension of delegation, the Regional Administrator must submit a report to the Assistant Administrator for Fisheries within 3 months outlining the specific measures implemented to remedy the problems identified in previous reviews. The Deputy Assistant Administrator for Regulatory Programs, in conjunction with the Director, Office of Protected Resources will review the report and the Region's Section 7 program and provide a recommendation to Assistant Administrator for Fisheries regarding the suspension of delegation. The suspension will remain in place until the Assistant Administrator for Fisheries reinstates delegation of authority.

3.5 Public Consultation Tracking System (PCTS). NMFS maintains a national tracking system (PCTS) to document and track the status of all Section 7 consultations. All Regional Offices and the Office of Protected Resources are required to participate in PCTS and to keep entries in the system current. A PCTS workgroup comprised of a national coordinator and regional and headquarters representatives will ensure maintenance of PCTS. The workgroup will refine the system as necessary to implement the Delegation, this Improvement Plan, and other initiatives

for improving the conduct of consultations and reporting on the efficiency and effectiveness of ESA consultations.

/s/	Dec. 13, 2005
William T. Hogarth, Ph.D.	Date
Assistant Administrator	
for NOAA Fisheries	